

OGC HAS REVIEWED.

COMPTROLLER GENERAL OF THE UNITED STATES
Washington 25

B-106300

12 August 1952

The Director

Central Intelligence Agency

My dear Mr. Smith:

Reference is made to your letter of October 29, 1951, requesting a decision upon certain questions involving the proposed employment of retired Foreign Service officers as well as the right of such officers to retain their retirement annuities upon employment in other Government agencies. You may be advised that action in this case was delayed pending the receipt of a report from the Department of State in the matter which report now has been received.

In your letter reference is made to section 2 of the act of July 31, 1894, 5 U.S.C. 62, which provides, in pertinent part, that:

"No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially authorized thereto by law * * *."

Your questions, which follow, are predicated in part upon those provisions:

"1. May a Foreign Service Officer, retired for age and in receipt of an annuity exceeding \$2,500.00 per year, be appointed to a full-time position with another agency of the Federal Government?

"2. May a Foreign Service officer, retired for disability or incapacity and in receipt of an annuity exceeding \$2,500.00 per year, be appointed to a full-time position with another agency of the Federal Government?

"3. May a Foreign Service officer, retired upon his own application (under Sec. 636 of the Foreign Service Act of 1946) and in receipt of an annuity exceeding \$2,500.00 per year, be appointed to a full-time position with another agency of the Federal Government?

"4. May a Foreign Service officer, 'selected out' (under the provisions of Sec. 637 of the Foreign Service Act of 1946) and in receipt of an annuity exceeding \$2,500.00 per year, be appointed to a full-time position with another agency of the Federal Government?

"5. If any retired Foreign Service officer enumerated above may be appointed to a full-time position with another agency of the Federal Government, ~~may~~ he continue to receive his annuity concurrently with the salary of his full-time position?"

In Office decision of August 6, 1936, 16 Comp. Gen. 121, also referred to in your letter, it was held that, while there was no prohibition in the Foreign Service retirement act against the reemployment in the Executive civil service of a Foreign Service officer retired for disability, there was no authority for the payment of his retirement annuity concurrently for the period of such employment. Although the retirement annuity in that case was less than \$2,500.00 it was not considered necessary to restrict that ruling to cases involving amounts less than \$2,500.00 because it was realized that a retired civilian employee does not hold an office within the meaning of the 1894 statute, supra.

Referring specifically to question No. 1, involving the reemployment of Foreign Service officers retired for age, your attention is invited to the provisions of section 204 of the act of June 30, 1932, 47 Stat. 404 (5 U.S.C. 715a), as follows:

"On and after July 1, 1932, no person rendering civilian service in any branch or service of the United States Government or the municipal government of the District of Columbia who shall have reached the retirement age prescribed for automatic separation from the service, applicable to such person, shall be continued in such service, notwithstanding any provision of law or regulation to the contrary: Provided, That the President may, by Executive order, exempt from the provisions of this section any person when, in his judgment, the public interest so requires: Provided further, That no such person heretofore or hereafter separated from the services of the United States or the District of Columbia under any provision of law or regulation providing for such retirement on account of age shall be eligible again to appointment to any appointive office, position, or employment under the United States or the District of Columbia: Provided further, That this section shall not apply to any person named in any Act of Congress providing for the continuance of such person in the service."

In view of the provisions of that act, it appears that the reemployment of Foreign Service officers, automatically retired for age, in other branches of the Federal service would be precluded unless specifically authorized in the manner set forth therein. Question 1 is answered accordingly, and, because of the nonapplicability of the 1894 statute, as previously indicated, questions 2, 3 and 4 are answered in the affirmative.

With respect to question 5 it may be stated that the retired officer involved in the decision of this Office dated August 6, 1936, supra, filed a suit in the Court of Claims and obtained judgment in his favor. See Brunswick v. United States, 90 C. Cls. 285. However, while the decisions of the Court of Claims are followed herein in many instances they are not binding upon this Office in the absence of affirmation by the Supreme Court of the United States. Moreover, the Department of State continued to suspend the retirement annuities of Foreign Service officers during the periods they were employed in the Government service even after the enactment of the Foreign Service Act of 1946, as amended, 60 Stat. 999, that Department apparently being of the view that no change occurred in the situation by reason of the enactment of that statute.

In view of the obvious inequity of permitting foreign service officers retired for disability to receive both retirement annuity and full compensation in another Government agency, when not permitted if reemployed in the foreign service, and when all other officers or employees of the Government when retired and reemployed are required, with certain statutory exceptions, to forego a portion or all of their retired pay (military or civilian) or have their civilian active duty pay reduced, this Office does not feel warranted in making any change in the views expressed in 16 Comp. Gen. 121. Accordingly, question 5 is answered in the negative.

Sincerely yours,